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In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ENERGY REGULATORY COMMISSION and JAMES B. EDWARDS, Secretary of Energy,
Appellants,

v.

THE STATE OF MISSISSIPPI, et al.,
Appellees.

On Appeal From the United States District Court For the Southern District of Mississippi

BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

ROGER J. MARZULLA*
GALE A. NORTON
ALISON L. NOVEN
Mountain States Legal Foundation
Attorneys for the Amicus Curiae

1200 Lincoln
Suite 600
Denver, CO 80203
(303) 861-0244
**Counsel of Record*

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BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES

Mountain States Legal Foundation files this brief as *amicus curiae* to urge that the decision of the court below be affirmed insofar as it held that title I, III and section 210 of the Public Utility Regulatory Policies Act (PURPA) is in violation of the Tenth Amendment. All parties have consented to the filing of this brief.

INTEREST OF AMICUS CURIAE

Mountain States Legal Foundation (MSLF) is a non-profit public interest law center, dedicated to bringing before the courts those issues vital to the individual rights and freedoms protected by the United States Constitution and the nation's legal traditions. The Foundation, which is supported entirely by the donations of its members, is deeply concerned with the protection of state sovereignty in the face of an ever-encroaching federal exercise of the commerce power. The continued vitality and effectiveness of the Tenth Amendment limitation on federal power is critical if states are to retain any semblance of integrity within the federal system. The lifeline rate standard in PURPA is a particularly offensive invasion of state sovereignty.

MSLF feels that it is an especially appropriate *amicus* in this case because of its past involvement with the lifeline rate issue in the mountain states. In 1979, MSLF was successful in establishing that the Colorado Public Service Commission was statutorily prohibited from implementing a lifeline rate. *Mountain States Legal Foundation v. Colorado Public Utilities Comm'n*, 197 Colo. 56, 590 P.2d 495 (1979). MSLF argued the same position before the Utah court. The Utah Supreme Court set aside a "senior citizen rate" on the basis that the Utah anti-preference statute required them to more carefully scrutinize the creation of a preferred subclass. While recognizing that cost of service is not the sole criterion for determining a "just" rate, the Court set aside the rate because of insufficient evidence of a rational connection between the characteristics of the class and the lower rate. *Mountain States Legal Foundation v. Utah Public Service Comm'n*, No. 16162 (Utah, Sept. 4, 1981). In addition, MSLF submitted arguments to the Idaho Public Utility Commission that consideration of lifeline rates was an improper function

of the Commission and that PURPA did not grant them authority to implement the rate because the federal statute violated the Tenth Amendment. The Commission declined to implement the lifeline rate on its merits, and thus chose not to reach the constitutional question. Idaho PUC Case No. P-300-16, Order No. 16707 (Aug. 26, 1981).

While MSLF agrees with the State of Mississippi that the majority of the PURPA provisions are unconstitutional, MSLF feels that section 114 is especially offensive to state sovereignty and that this issue may not be adequately addressed by the existing parties.

The members of MSLF are vitally concerned that state regulatory authorities across the country remain independent of federal domination and that they be able to freely perform their rate-making responsibilities in accordance with state law and in a manner which best serves the interest of the state. MSLF does not dispute that because of dramatic increases in energy costs, certain residential customers may have difficulty paying the cost of utility service essential to their well-being and that some public assistance to such consumers may, therefore, be appropriate. However, MSLF believes the need for such social welfare programs is a legislative matter which ought to be determined by elected officials and that rate-making is not an appropriate method for creating and implementing such public assistance programs.

We therefore urge this Court to jealously guard the sovereign powers of the state from unlawful encroachment by the federal government. PURPA is a dangerous assertion by the federal government of the power to direct a state regulatory authority's exercise of its state responsibilities.

STATEMENT

The Public Utility Regulatory Policies Act of 1978, Pub. L. No. 96-617, 92 Stat. 3119, 16 U.S.C. §§ 2601 to

2704 (Supp. III 1979) is a federal program, born out of the concern for the conservation of energy, which compels state regulatory authorities to hold hearings to consider numerous federal standards for retail utility rate-making.

Section 114, 16 U.S.C. § 2624 specifically requires the state regulatory authority to consider the appropriateness of a lifeline rate:

> (a) Lower Rates. No provision of this title prohibits a State regulatory authority (with respect to an electric utility for which it has ratemaking authority) or a nonregulated electric utility from fixing, approving, or allowing to go into effect a rate for essential needs (as defined by the State regulatory authority or by the nonregulated electric utility, as the case may be) of residential electric consumers which is lower than a rate under the standard referred to in section 111(d)(1) [cost based rates].
>
> (b) Determination. If any State regulated electric utility or nonregulated electric utility does not have a lower rate as described in subsection (a) in effect two years after the date of the enactment of this Act, the State regulatory authority having ratemaking authority with respect to such State regulated electric utility or the nonregulated electric utility, as the case may be, shall determine, after an evidentiary hearing, whether such a rate should be implemented by such utility.
>
> (c) Prior Proceedings. Section 124 [prior proceedings may satisfy hearing requirement] shall not apply to the requirements of this section.

In essence section 114 allows for an exception from a traditional cost-based retail utility rate. That type of rate is generally known as a "lifeline rate". The concept behind a lifeline rate is that "a minimum basic allowance of house-

hold energy should be supplied at discounted rates and that consumption of electricity and gas in quantities exceeding allowable limits should be billed at higher (non-lifeline) rates . . . ." Dahl, *California's Lifeline Policy*, Pub. Util. Fort. 13, 14, (Aug. 31, 1978).

There are many different schemes for providing a lifeline rate. Some plans provide an across-the-board, below-cost, uniform charge for an initial block of electrical consumption by all residential customers, while others provide the below-cost rate only to specifically identified residential customers, such as the poor or the elderly. Both plans are extremely controversial ideas that state legislatures and state regulatory agencies have been debating for several years. *See* Note, *The Legislative Evolution of Title I of the Public Utility Regulatory Policies Act of 1978: The Study in Compromise*, J. Corp. L. 105, 134, (Fall 1979).

Section 114 requires the state regulatory authority to hold an evidentiary hearing to consider whether to implement a lifeline rate. These hearings must be conducted according to procedural rules prescribed by PURPA. Section 112(a), 16 U.S.C. § 2622(a), creates a right to demand consideration of the federal standards during a utility ratemaking hearing held pursuant to state law. Section 121(a), 16 U.S.C. § 2631(a), establishes rules on intervention. Section 122, 16 U.S.C. § 2632, mandates certain rules for awarding costs and attorney fees. Indeed, the procedural rules imposed by PURPA are so specific that they even tell the state commission what it may charge for transcripts.[1]

Congress did not limit itself to writing procedural rules for the state commissions, but also asserted the power to tell state courts who is entitled to appeal from the commission's orders as a matter of right, the power to establish rules on awarding costs and attorney fees applicable to

[1] Section 122(c), 16 U.S.C. § 2632(c) (Supp. III 1979).

judicial appeals,[3] and the power to create a cause of action in state courts to collect those fees and costs.[4] Congress specifically intended that these various procedural requirements override any inconsistent state procedures. H.R. Conf. Rep. No. 95-1750, 95th Cong., 2d Sess. 63, *reprinted in* [1978] U.S. Code Cong. and Ad. News 7659, 7805 [hereinafter cited as *Conference Report*].

Section 114 violates the laws of many states because it allows for a preference or discrimination as to one group of consumers over another. Thus, if a public service commission adopts the federal "essential needs" rate, it is both granting a preference to one identified group of consumers, and correspondingly discriminating against all other consumer groups. The non-preferred group must pay more for service, because their rates are subsidizing the preferred group. A lifeline rate by definition creates a preferential rate. A preference by a public utility "results only from allowing to one person what [is denied] to another under substantially the same circumstances." *Elk Hotel Co. v. United Fuel Gas Co.*, 75 W.Va. 200, 83 S.E. 922 (1914). Age or economic status are not appropriate factors to justify different utility rates. The "circumstances" referred to are the services provided for the two rates compared rather than the characteristics of the users. That conclusion stems from the fundamental concept governing utility rate-making, that being:

> A public service corporation is impressed with the obligation of furnishing its *service* to each patron at the same price it makes every other patron pay for the same or substantially the same *service* on equal terms.

Town of Wickenburg v. Sabin, 68 Ariz. 75, 200 P.2d 342, 343 (1948) (emphasis added). *Accord, State ex rel. Util-*

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[2] Section 123(c), 16 U.S.C. § 2633(c) (Supp. III 1979).
[3] Section 122(a)(1), 16 U.S.C. § 2632(a)(1) (Supp. III 1979).
[4] Section 122(a)(2), 16 U.S.C. § 2632(a)(2) (Supp. III 1979).

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The granting of a lifeline rate preference is generally found to be illegal under state laws which prohibit preferential or discriminatory rates. *See, e.g., Re Rate Public Serv. Co. of New Hampshire*, 95 P.U.R.3d 401, 448 (N.H. Pub. Util. Comm'n 1972); *Rate Concessions to Poor Persons & Senior Citizens*, 14 P.U.R.4th 87 (Or. Pub. Util. Comm'n 1976); *Pennsylvania Public Utilities Comm'n. v. Philadelphia Elec. Co.*, 91 P.U.R.3d 321 (Pa. Pub. Util. Comm'n 1971); *In re Investigation on the Commission's own Motion*, Cause No. U078-05, at 20 (Wash. Util. & Transp. Comm'n, Oct. 29, 1980).[5]

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[5] While apparently only the above-cited commission decisions specifically referred to a preference statute when rejecting "lifeline rate" type proposals, it appears that the majority of commissions which have considered the proposal, have rejected it. *See Re Southern Bell Telephone & Telegraph Co.*, 7 P.U.R.3d 55 (Ala. Pub. Serv. Comm'n 1954) (rejected proposal that rates not be raised for low-income customers); *Re Potomac Electric Power Co.*, 84 P.U.R.3d 250 (D.C. Pub. Serv. Comm'n 1970) (rejected proposal that residential electric rates not be raised for low-income consumers); *Re Louisville Transit Co.*, 82 P.U.R.3d 1 (Ky Dep't of Motor Transp. 1969) (rejected proposal that fares not be increased for low-income persons); *Re New England Telephone & Telegraph Co.*, 84 P.U.R.3d 130 (Mass. Dep't of Pub. Util. 1970) (rejected proposal that special telephone rates be provided for the elderly); *Re East Ohio Gas Co.*, 16 P.U.R.4th 37 (Ohio Pub. Util. Comm'n 1976) (rejected proposal that lifeline rates be implemented); *Re Investigation into Rate Structure of Electric Utility*, 38 P.U.R.4th 409 (Or. Pub. Util. Comm'n 1980) (implementation of lifetime rate rejected); *Re Central Vermont Public Service Corp.*, 7 P.U.R.4th 67, 76 (Vt. Pub. Serv. Bd. 1974) (rejected a proposal that no rate increase be allowed until consumers' ability to pay improved); and *Washington Utilities & Transportation Comm'n v. Pacific Power & Light Co.*, 10 P.U.R.4th 449 (Wash. Util. & Transp. Comm'n 1975) (rejected proposal that rate increase not be imposed on the poor and on the low-income elderly). *Contra, American Hoechest Corp. v. Dep't of Pub. Util.*, 399 N.E.2d 1 (Mass. 1980) (special rate for elderly poor not found to be unduly or irrationally discriminatory).

Colorado Revised Statutes § 40-3-106(1) (1973) is typical of state anti-discrimination laws. It provides: "No public utility, as to rates shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage." Presently thirty-seven other states have similar anti-discrimination laws which prohibit all or unreasonable preferences,[6] and four more states grant the public utility commission discretion to invalidate preferential rates.[7]

In *Mountain States Legal Foundation v. Colorado Public Utilities Comm'n,* 197 Colo. 56, 590 P.2d 495 (1979), the Colorado Supreme Court specifically found that the state anti-discrimination law prohibited the public

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[6] Alaska Stat. § 42.05.391(a) (1976); Ariz. Rev. Stat. § 40-334(A) (1974); Ark. Stat. Ann. § 73-207 (1979); Cal. Pub. Util. Code § 453(a)(c) (West Supp. 1981); Del. Code tit. 26, § 303(a) (Supp. 1980); D.C. Code Encycl. § 43-201a (West Supp. 1978); Idaho Code § 61-315 (1976); Ill. Ann. Stat. ch. 111 2/3, § 38 (Smith-Hurd Supp. 1981); Ind. Code Ann. § 8-1-2-105 (Burns Supp. 1981); Iowa Code § 476.5 (1981); Kan. Stat. § 66-107 (1980); Ky. Rev. Stat. § 278.170(1) (1981); Me. Rev. Stat. tit. 35, § 102 (Supp. 1980); Md. Ann. Code art. 78, § 26(a) (1980); Minn. Stat. § 216B.23(1) (1980); Mo. Ann. Stat. § 393.130(3) (Vernon Supp. 1981); Mont. Rev. Code Ann. § 69-3-201 (1979); Nev. Rev. Stat. § 704.040 (1979); N.H. Rev. Stat. Ann. § 378:10 (1966); N.J. Rev. Stat. § 48:3-1(a) (1969); N.M. Stat. Ann. § 62-8-6 (Supp. 1981); N.Y. Pub. Serv. Law § 65(3) (McKinney 1955); N.C. Gen. Stat. § 62-140(a) (Supp. 1979); N.D. Cent. Code § 49-04-07 (1978); Ohio Rev. Code Ann. § 4905.35 (1977); Or. Rev. Stat. § 757.325(1) (1979); 66 Pa. Cons. Stat. Ann. § 1304 (Purdon 1979); S.D. Compiled Laws Ann. § 49-34A-3 (Supp. 1980); Tenn. Code Ann. § 65-514 (1976); Tex. Rev. Civ. Stat. Ann. art. 1446c § 38 (Vernon 1980); Utah Code Ann. § 54-3-8 (1974); Vt. Stat. Ann. tit. 30, § 218 (1970); Va. Code § 56-234 (1981); Wash. Rev. Code § 80.28.090 (1979); W.Va. Code § 24-3-2 (1980); Wis. Stat. § 196.62 (1957); Wyo. Stat. § 37-3-101 (1977).

[7] Fla. Stat. § 366.06(2) (Supp. 1981); Hawaii Rev. Stat. § 269-16(b) (1976); Miss. Code Ann. § 77-3-41(1) (Supp. 1980); S.C. Code 58-5-290 (1976).

utility commission from implementing a lifeline rate. It is likely that if faced with a similar challenge other state courts would follow Colorado's example. Thus, under section 114 of PURPA the federal government requires the expenditure of state staff time and resources to provide a hearing to consider whether to implement a utility rate that may ultimately be struck down by the state courts.

SUMMARY OF ARGUMENT

Section 114 of PURPA violates the Tenth Amendment protection of state sovereignty. Section 114 directs the state regulatory authority to consider, after holding an evidentiary hearing, whether to implement a lifeline rate. The adoption of a preferential rate is, in a majority of states, specifically prohibited by state law.

In *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 101 S.Ct. 2352 (1981), this Court laid out the three-part test to determine when an exercise of congressional commerce power is invalid as a violation of the Tenth Amendment. Under that test, section 114 is clearly an unconstitutional invasion of state sovereignty.

Section 114 regulates states as states, because it places obligations directly on state regulatory authorities not on private individuals or commercial operations.

Section 114 invades the state's sovereign attribute of governmental decisionmaking by directing what hearings the state regulatory authority will hold, how its staff and resources will be allocated, and who shall have the right to become involved in the hearings. Regulation of the state's governance activities is beyond the commerce clause power of Congress. Section 114 unconstitutionally attempts to compel state officials to perform federal duties. The polit-

ical accountability of state officals is also harmed, when the regulatory bodies must answer to the federal government rather than to their local constituents.

The regulation of retail utility rates is a traditional function of state governments. While it has been necessary for the federal government to step in to regulate energy once it crosses state lines, federal agencies have always been careful to leave intact the essential state control. The mandate that state regulatory authorities hold full evidentiary hearings to consider implementation of a highly controversial, social-welfare type lifeline rate is an unnecessary and unconstitutional overreaching by the federal government into an area of traditional state functions.

If the Tenth Amendment is to survive as a meaningful protection of state sovereignty, it should be enforced here to prevent Congress from directing the activities of state regulatory authorities.

ARGUMENT

I. SECTION 114 OF PURPA INVADES STATE SOVEREIGNTY IN A MANNER PROHIBITED BY THE TENTH AMENDMENT.

In our federalist system, sovereign powers are divided by the Constitution between the federal government and the respective states. The sphere of the federal government includes only the powers granted it by the Constitution, while the states are sovereign with respect to all powers not granted the federal government and reserved to the states by the Tenth Amendment. The precise delineation of state and national spheres of power is a problem the courts have grappled with for many years, particularly with respect to the federal government's broad powers under the

commerce clause. If the federal form of government is to remain viable, the judiciary must clearly delineate the boundaries of national and state powers.

The Founding Fathers, and the courts until the New Deal, recognized the importance of state sovereignty. *See, e.g., Coyle v. Smith,* 221 U.S. 559 (1911); *United States v. Butler,* 297 U.S. 1 (1937). However, a drastic shift in judical philosophy devastated the role of states in the federal system. *See, e.g., Stewart Machine Co. v. Davis,* 301 U.S. 548 (1937); *United States v. Darby,* 312 U.S. 100 (1941).

National League of Cities v. Usery, 426 U.S. 833 (1976), was a first step forward in establishing guidelines for preserving state autonomy. Although *National League of Cities* marked a reawakening of state sovereignty principles, it did not provide a clear test for determining when the national government has overstepped the bounds of its enumerated powers.

In the *Virginia Surface Mining* decision, this Court clarified *National League of Cities* by explaining:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." *Id.* at 854. Second, the federal regulation must address matters that are indisputably "attributes of state soverignty." *Id.* at 845. And third, it must be apparent that the State's compliance with the federal laws would directly impair their ability to "structure integral operations in areas of traditional functions." *Id.* at 852.

101 S.Ct. at 2366.

The Surface Mining and Reclamation Act, 30 U.S.C. § 1201-1328 (Supp. I 1977), was upheld because its provisions "govern only the activities of coal mine operators who are private individuals and businesses." 101 S.Ct. at 2366. The statute had been challenged as a violation of the Tenth Amendment because of its pervasive effect on the states' ability to make independent land use decisions. The Court emphasized that in contrast to situations similar to the facts in *EPA v. Brown*, 431 U.S. 99 (1977), here ". . . the States are not compelled to enforce the . . . standards, to expend any state funds, or to participate in the federal regulatory program in any manner whatsoever . . . the full regulatory burden will be borne by the Federal Government." 101 S.Ct. at 2366. Certainly the same cannot be said of PURPA. PURPA is a violation of the Tenth Amendment because it fits squarely within the three requirements set out in *Virginia Surface Mining*.

A. *Section 114 of PURPA Attempts to Regulate the "State as States".*

PURPA is an exercise of power aimed directly at the "States as States". Section 114 requires that if a lifeline rate is not already in effect in the state, the "State regulatory authority" must hold a hearing to determine whether to implement the lower rate. The definition section of the statute makes clear that a "State regulatory authority" is a "State agency", 16 U.S.C. § 2602(16)(17).

B. *Section 114 of PURPA Addresses Matters that are Attributes of State Sovereignty.*

1. Public utility commissions are state governmental decisionmaking bodies.

PURPA addresses matters that are indisputably attributes of state sovereignty. It is a direct regulation of state

government decisionmaking. State regulatory authorities, commonly known as public service commissions, are administrative agencies created by state statutory or constitutional authority, with only such power as is specifically granted or delegated to them. *See, e.g., Washington Water Power Co. v. Kootenai Environmental Alliance,* 99 Idaho 86, 591 P.2d 122 (1979); *Mountain States Telephone & Telegraph Co. v. Public Utilties Comm'n,* 195 Colo. 130, 576 P.2d 544 (1978). The state commission is an agency of the state, created by the exercise of the sovereign powers of the state, holding only the authority which has been delegated to it by the state. The commissions' rate-making authority is carefully circumscribed by state law which generally does not authorize social welfare programs under the guise of rate-making. *Idaho Power Co. v. Thompson,* 19 F.2d 247 (S.D. Idaho 1927). Most public service commissions exercise a hybrid mixture of legislative, judicial and executive power. Thus, interference with their function is direct interference with the independent decisionmaking of state government. If the states are deprived of the ability to make fundamental decisions as to how their regulatory agencies will be operated, then there will be little left of the state's independence that will make them distinguishable from the federal government as separate entities existing in their own sovereign right.

2. Congress' commerce clause powers do not extend to the regulation of the state's governance of commerce.

In PURPA, Congress exercised its power under the Commerce Clause in a unique way. The focus of PURPA is not upon the regulation of interstate commerce but upon the regulation of *state regulation* of commerce. PURPA does not regulate commerce itself but attempts to regulate the manner in which states exercise their legislative, judicial and executive power to regulate public utilties.

In contrast to other federal schemes which are aimed primarily at the operations of private business, *see Virginia Surface Mining, supra,* PUPRA, by definition, orders the "state regulatory authority" to comply with federal mandates. The commerce power provides Congress with no such power. Certainly the Commerce Clause is a grant of plenary authority to Congress. The subject of that authority, however, must be commerce, not the governance of commerce.

> To treat the governance of commerce by the states as within the plenary reach of the Commerce Power would in our opinion represent such an abrupt departure from previous constitutional practice . . . To make *governance* indistinguishable from *commerce* . . . would reduce states to puppets of a ventriloquist of Congress.

Brown v. EPA, 521 F.2d 827, 839 (9th Cir. 1975), *vacated per curiam,* 431 U.S. 99 (1977), *reinstated in part,* 566 F.2d 665 (9th Cir. 1977).

The opinion in *National League of Cities,* highlights this critical distinction. In *National League of Cities,* the Court re-affirmed the prior decision of *Fry v. United States,* 421 U.S. 542 (1975), by distinguishing it from *National League of Cities.* The Court noted that Congress, by passing the Economic Stabilization Act of 1970, Pub. L. No. 91-151, 83 Stat. 377, did not intend to usurp the states ability to make its own governance decisions. The statute challenged in *Fry,*

> [D]isplaced no state choices as to how governmental operation should be structured, nor did it force the States to remake such choices themselves. Instead it merely required that the wage scales and employment relationships which the States

> *themselves* had chosen be maintained during the period of emergency.

426 U.S. at 853 (emphasis added). *Accord, Brown v. EPA, supra* (where the Ninth Circuit carefully distinguished the power of the federal government to regulate operation of state-owned vehicles which may pollute from its lack of power to direct the state to govern its citizens who may pollute). *See also Maryland v. EPA*, 530 F.2d 215 (4th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *District of Columbia v. Train*, 521 F.2d 971 (D.C. Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99, *reinstated in part and remanded in part sub nom. District of Columbia v. Costle*, 567 F.2d 1091 (D.C. Cir. 1977); *Arizona v. EPA*, 521 F.2d 825 (9th Cir. 1975), *vacated sub nom. EPA v. Brown*, 431 U.S. 99 (1977); *Alaska v. EPA*, 521 F.2d 842 (9th Cir. 1975). *Contra, Pennsylvania v. EPA*, 500 F.2d 246 (3d Cir. 1974) (relied heavily on *Maryland v. Wirtz*, 392 U.S. 183 (1968) which was later expressly overruled in *National League of Cities*).

The issue here is not whether the activity is "purely intrastate" or a "local activity" or that it does not "substantially affect interstate commerce". PURPA is unconstitutional because it does not regulate commerce at all, but is directed at the state's governance of commerce.[8]

Arguments that because the Commerce Clause would give Congress the power to totally pre-empt the field of utility regulation, it follows that the Commerce Clause would allow Congress to direct a state agency to implement

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[8] As the government points out, Brief for Appellants at 28 n.33, PURPA may be valid only as applied to the nonregulated utilities because they are "individuals and businesses necessarily subject to the dual sovereignty of" federal and state governments. *Hodel v. Virginia Surface Mining & Reclamation Ass'n, supra*, quoting from *National League of Cities v. Usery*, 420 U.S. at 845.

in total the federal program, are simply wrong. Such arguments ignore the fine line which protects the doctrine of state sovereignty.

Use of the *Virginia Surface Mining* decision to support such an argument, pulls language of the opinion out of context. A careful reading of the opinion reveals that the Court had characterized the Surface Mining Act as another example of a cooperative federalism statute. Cooperative federalism statutes follow a basic plan:

> Federal statutes and administrative rules establish the regulatory framework; states prepare and submit to the federal agency packages of state statutes and regulations designed to implement the federal law; if a state plan is approved, the state assumes primary implementation authority; if a state does not submit an approvable plan, the federal agency remains in charge of administering the act.[9]

PURPA does not fit within that pattern since it directly mandates obligations from existing state regulatory authorities.[10] Furthermore, none of the challenged provisions of PURPA allow states the option of dropping out of the regulatory scheme. The only arguable "option" left to the states under PURPA is for the states to dismantle their long existant public utility commissions and allow

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[9] *See,* Battle, *Transportation Controls Under the Clean Air Act — An Experience in (Un)Cooperative Federalism,* 15 Land and Water L. Rev. 1,2 (1980).

[10] When the Court spoke in *Virginia Surface Mining* of "allowing the states a regulatory role" 101 S.Ct. at 2367, it must have been speaking of the states' option to submit a state plan rather than have the federal plan administered by the federal government. Indeed three paragraphs before that the Court specifically notes that ". . . States are not compelled to . . . participate in the federal regulatory program in any manner whatsoever." 101 S.Ct. at 2366.

the federal government to regulate them as "non-regulated utilities". Nowhere does any such suggestion appear in the legislative history. One would be hard pressed to show that Congress intended the states to have such an option under PURPA.

The Court makes another distinction which also contradicts support of such an argument. The Court emphasizes that *National League of Cities* does not shield the states from federal pre-emption of their police power over individuals or commercial operations when a substantial affect on interstate commerce is found, 101 S.Ct. at 2367. However, as pointed out above, PURPA is directed at the states' governance of commerce, *not* at the states' exercise of police power over private activities.

Section 114 of PURPA attempts to exercise power the Congress does not have. Far from being any type of regulation of energy as a proper subject of interstate commerce, PURPA is an attempt to direct the regulatory activities of state agencies. Section 114 directs the state regulatory authority to expend state resources and personnel to evaluate a federally conceived "essential needs" rate for electric consumers, the implementation of which would probably be found to be prohibited by a majority of state laws across the country.

This consideration and determination, in light of state law constraints, of the appropriate rate schedule for a public utility cannot be characterized as anything but "governance" by the state. It is not enough that PURPA provides that state law shall ultimately control the implementation of the rate standards, 16 U.S.C. § 2621(a), the unconstitutional intrusion is in requiring the expenditure of time and resources to defend a decision not to enforce a standard which is most likely in violation of state law to begin with.

Even if this Court wished to extend the reach of the Commerce Clause to governance, there can be no argument that section 114 is reasonably related to the goals of promoting energy conservation and more efficient use of energy resources. Brief of Appellants at 19. The legislative history clearly indicates that the purpose of the lifeline amendment was to effect a re-distribution of wealth in favor of the poor and the elderly,[11] not to conserve energy. Nor can it be asserted that section 114 is an "integral part of the regulatory program", *Hodel v. Indiana,* 101 S.Ct. 2376, 2385 n.17 (1981). Section 114 is an exception to the cost standards suggested by section 111, 16 U.S.C. § 2621, and not essential to the success of the regulatory scheme.

3. Section 114 unconstitutionally compels state officials to perform a federal duty.

The Conference Committee report on PURPA clearly shows that it was Congress' intention to compel state officials to implement a federal program and to regulate by federal law the manner in which state officials perform their state responsibilities. *Conference Report, supra* at 7804-7819.

This is not a situation as in *District of Columbia v. Train,* 521 F.2d 971 (D.C. Cir. 1975), where the court noted the power of the EPA Administrator to require that the state not register any vehicles which are not in conformance with the federal plan. It is important to recognize the significant difference between proscribing the state from acting in conflict with federal law, and requiring affirmative action on the part of the state to expend its resources to implement a federally conceived program, *see Brown v. EPA,* 566 F.2d 665, 673 (9th Cir. 1977). The

[11] Public Utility Rate Proposals of President Carter's Energy Program: Hearing Before the Subcommittee on Energy Conservation and Regulation of the Committee on Energy and Natural Resources, 95th Cong., 1st Sess. pt. 1 & 2 (1977).

Supremacy Clause, U.S. Const. art. VI, cl. 2 requires that a state not interfere with the proper exercise of congressional power. The Supremacy Clause does not validate an attempt by Congress to force state officials to take over the implementation of a federal program.[12] The directives of section 114 compel state officials to fulfill entirely the obligations of the federal plan, and cannot be read as merely enlisting one of the traditional functions of the state to ensure compliance with an otherwise federally run program.

As early as 1861, the United States Supreme Court recognized "the Federal Government under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it." *Kentucky v. Dennison,* 65 U.S. (24 How.) 66, 107 (1861).[13]

4. The political accountability of state officials and legislators is damaged.

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[12] Any argument that the Supremacy Clause provides the authority to Congress to direct the actions of state officials is misplaced. The language of art. VI, cl. 2 specifically provides that as to the "Laws of the United States . . . the Judges in every State shall be bound thereby." Certainly no one is suggesting that the Supremacy Clause somehow overrides the protection of the Tenth Amendment or makes state judges employees of the federal government. Application of the Supremacy Clause *presupposes* that Congress has properly exercised the "power confided to it". *Testa v. Katt,* 330 U.S. 386, 392 (1947); *accord, United States v. Wheeler,* 435 U.S. 313, 320 (1978) ("the Supremacy Clause gives Congress *within its sphere* the power to enact laws superseding conflicting laws of the State . . ."). When the challenge is that Congress has not acted properly, the Supremacy Clause is simply irrelevant. The Clause does not provide the source of authority for a law, *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 613 (1979), but merely "secures" it once it is established.

[13] Appellants misinterpret the effect of *Monell v. New York City Dep't of Social Services,* 436 U.S. 658, 678 (1978), on *Kentucky v. Dennison,* 65 U.S. (24 How.) 66 (1861). In *Monell* the Court distinguished *Dennison* but did not overrule it. *Monell* involved municipal liability under 42 U.S.C. § 1983; *Dennison* like the present case, involves a federal statute which imposed affirmative obligations on state officials.

When the ability to engage in independent decision-making is imparied, a corollary attribute of state sovereignty is also damaged: the usual lines of political accountability. In PURPA the federal government has bypassed the state legislatures and imposed duties directly on state regulatory authorities. The state legislatures are then deprived of the power to alter the activities of the regulatory authorities. Who then is their master? State government cannot alter federally mandated programs, and federal agencies cannot unilaterally alter state programs. Thus, a representative form of government, reliant upon citizen input, erodes into an unresponsive and confusing labyrinth that is far removed from the normal political processes. *See Stromberg v. California,* 283 U.S. 359, 369 (1931); *United Mine Workers v. Illinois State Bar Association,* 389 U.S. 217 (1967).

Section 114 is particularly offensive to the notion of political accountability because it requires the state regulatory authority to hold full due process hearings to consider adopting an "essential needs" rate which in a majority of states has already been declared by the state legislature to be beyond their statutory authority to implement. Thus, section 114 requires a wasteful expenditure of state resources, and the legislature is powerless to remedy the situation.

C. *The States' Compliance with Section 114 of Purpa would Directly Infringe on their Ability to Structure Integral Operations in Areas of Traditional Functions.*

The states' compliance with PURPA would directly impair their ability to structure integral operations in areas of traditional function. This Court recognized as early as 1912 that it became a "frequent practice" for states to create agencies with the power to supervise, regulate

and determine rates for public monopolies, *Simpson v. Shepard (the Minnesota Rate Cases)*, 230 U.S. 352, 414 (1885).[14]

An examination of the traditional objectives behind the regulation of public utilities indicates they are illustrative of those activities that are "typical of those performed by state and local governments in discharing their dual functions of administering the public law and furnishing public services," which *National League of Cities* sought to protect, 426 U.S. at 851. Utility services are most efficiently and inexpensively provided by a large monopolistic entity rather than by a number of small, competing entities. Public utility commissions were created to protect the public from abuses of this monopolistic power by public utilities. Commissions were given the responsibility to insure that public utilities provided adequate service to the public and to insure that public utilities did not use their monopolistic power to enrich themselves at the expense of the consumers. 1 A.J.G. Priest, *Principles of Public Utility Regulation* 1-2 (1969) [hereinafter cited as *Priest*]. *Cf. Amersbach v. City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979) (operation of municipal airport integral government function); *United Transportation Union v. Long Island Rail Road Co.*, 634 F.2d 19 (2d Cir. 1980), *cert.*

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[14] See *ICC v. Cincinnati, New Orleans, and Tex. Pac. Ry. Co.*, 167 U.S. 479, 495-500 (1897), for a summary of state legislation regulating railroads. While railway rates were generally the first of the "public monopolies" to be regulated, the exercise of control over utilities followed close behind. The government's brief notes that Mississippi did not regulate utilities until 1956. Brief of Appellants at 30 n.35. Mississippi may have lagged behind some of the other states in establishment of a Public Utility Commission, but that certainly does not indicate that state regulation of public utilities has not been a traditional state function. Of the 20 most populous states, continuous commission control of utility rates began as early as 1885, and by 1921, 18 of them regulated both gas and electricity. Jones, *Regulated Industries* 40 (2d ed. 1976).

granted, 101 S.Ct. 3107 (1981) (state-owned rail common carrier integral government function).

PURPA specifically requires the state to expend state funds, and to partcipate in a federal regulatory program. While it does not require the states to enforce the federal rate standards, it does require them to hold public hearings according to federal procedural standards and to submit written reasons for why the rate standards were not implemented. PURPA interferes with the freedom of the state in its regulation of retail utility rates to determine what rates it will consider, what hearings it will hold, and how the commission will use and allocate decisionmaking authority and staff resources. In addition, the procedural provisions of PURPA displace the state's traditional freedom to structure the procedures before its regulatory agencies and courts.

The government asserts that because federal agencies exert regulatory power over the interstate commerce aspects of public utility regulation that somehow justifies interference with the state regulatory authority. There may be concurrent federal and state regulation of public utilties but the "long history" of that regulation enforces rather than dilutes the dividing line between federal and state sovereignty.

It is well recognized that federal regulation of public utilities came about only because "gaps" in the state's authority were found. *Public Utility Comm'n v. Attleboro Steam & Electric Co.,* 273 U.S. 83 (1927). Federal jurisdiction was meant only to fill those gaps, not to disrupt the state's regulatory authority. *Connecticut Light & Power Co.*

v. FPC, 324 U.S. 515 (1945).[15] The Federal Power Act itself was careful to specifically limit federal jurisdiction, "only to those matters which are not subject to regulation by the states." 16 U.S.C. § 824 (1978).

The "long history" shows that states have been competently regulating public utilities from at least 1907, and today almost every state has a regulatory agency at either the state or municipal level. *Priest, supra* at 25.

Section 114 is especially intrusive because it mandates consideration of a utility rate totally out-of-line with the normal rate-making processes. Rate-making traditionally has been a process of determining a utility's total cost of providing the service, including a reasonable rate of return to the utility, and matching these costs to the consumers who impose them. *See* Aman and Howard, *Natural Gas and Electric Utility Rate Reform: Taxation Through Ratemaking?* 28 Hastings L.J. 1085 (1977). A lifeline rate is the antithesis of traditional rate-making in that it allows for a reduced rate to a certain group of residential consumers, resulting in a deficiency which must be paid by other consumers, justified solely as a matter of social policy. Essentially, it is a method of using utility rates to redistribute wealth for social purposes. *See* Electric Utility

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[15] That the federal government did not wish to interfere with state rate-making authority is further evidenced by passage of The Johnson Act, 28 U.S.C. § 1342 (1976), which prohibited federal district courts from hearing most challenges to state rate orders. The Tenth Circuit has stated that the purpose of the Act is:

> [T]o keep constitutional challenges to orders affecting rates out of the federal courts, "lock, stock and barrel," or, as Professor Moore succinctly puts it, to effect a "general hands-off policy relative to state rate making."

Tennyson v. Gas Service, 506 F.2d 1135, 1138 (10th Cir. 1974), citing to 1A Moore, Federal Practice ¶ 0.206, at 2282 (1974).

Rate Design Study, Reference Manual and Procedures for Implementing PURPA 4-19 (March 1979).

Certainly such a far-reaching change in the utility regulatory approach is a difficult policy decision and a major change in the integral operations in an area of traditional function which only states should determine. It is entirely inappropriate for the federal government to mandate that a state regulatory authority spend time and money hearing evidence on such a novel approach, partcularly when the state legislature has either outlawed that approach or net yet felt the pressure of the populace to implement it.[16]

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[16] Adoption of preferential utility rates usually requires legislative action. *See, e.g., Interstate Consolidated Street Parking Co. v. Massachusetts*, 207 U.S. 79 (1907) (state *statute* required that school children be transported by street railway at half price); *Re Chesapeake & Potomac Telephone Co.*, 93 P.U.R.3d 361 (Md. Pub. Util. Comm'n 1972) (a utility was specifically permitted by *statute* to offer discounted rates to charitable institutions); *Grace Institute v. Clark*, 35 App. Div. 2d 368, 316 N.Y.S.2d 670 (1970) (where cancellation of water and sewer charges to charitable institutions was specifically authorized by a New York City *ordinance*); Cal. Pub. Util. Code § 739 (1975 & West Supp. 1981) (lifeline rate implemented by *statute*).

CONCLUSION

In the words of Mr. Justice Rehnquist, "[O]ne of the greatest 'fictions' of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the states or to the people. . . . Although it is clear that the people, through the states, *delegated* authority to Congress to 'regulate Commerce . . . among the several states,' U.S. Const. art I, § 8, one could easily get the sense from this Court's opinions that the federal system exists only at the sufferance of Congress." *Virginia Surface Mining, supra* at 2389 (Rehnquist, J., concurring).

If this Court means to provide any protection to the states as states through the Tenth Amendment, then section 114 of PURPA must be struck down as unconstitutional. Any narrower reading of the Tenth Amendment would reduce the grand ideal of state sovereignty to the mere ability to determine the hours and wages of state employees.

For all of the foregoing reasons Mountain States Legal Foundation urges this Court to affirm the opinion of the district court, at least insofar as it holds titles I, III and and section 210 of PURPA to be a violation of the Tenth Amendment.

Respectfully submitted,

ROGER J. MARZULLA*
GALE A. NORTON
ALISON L. NOVEN
Mountain States Legal Foundation
Attorneys for the Amicus Curiae

1200 Lincoln
Suite 600
Denver, CO 80203
(303) 861-0244